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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT O. GILMORE, JR., et al., Appellants, vs. THOMAS C. LYNCH, et al., Appellees.	No. 22052 ✓ A-B-C-D-E-F-G

BRIEF OF APPELLEES

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JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellants' petition below was conferred by the Civil Rights Act (42 U.S.C. § 1983 and 28 U.S.C. § 1343). Proceedings in forma pauperis were authorized by Title 28, United States Code section 1915. Jurisdiction for this Court, in its discretion, to review the order appealed from is conferred by 28 U.S.C. § 1292(4)(b).

STATEMENT OF THE CASE AND THE FACTS

On October 27, 1966, appellant Robert O. Gilmore, Jr., and eighty-eight other inmates of the California State Prison at San Quentin filed in the United States District Court for the Northern District of California a complaint naming as defendants the People

of the State of California, the Department of Corrections of the State of California, Richard A. McGee, Walter Dunbar, and Lawrence E. Wilson. The complaint sought an injunction against the enforcement of certain rules adopted by the Director of Corrections relating to the contents of prison law libraries and describing the personally-owned legal opinions which inmates would be permitted to possess (CT 1-27). On January 11, 1967, the named defendants filed a motion to dismiss, after having received an order extending time to plead (CT 70-76). On January 10, 1967, the District Court, Honorable William T. Sweigert ordered the action consolidated with three others brought by other inmates, and appointed counsel for plaintiffs, on the ground that the "actions raise important questions in the access of prisoners to the courts . . . ." (CT 65-69).

On March 14, 1967, counsel for plaintiffs filed a motion for preliminary injunction and for the convening of a three-judge district court (CT 89-92), and on March 20, 1967, points and authorities in opposition to defendants' motion to dismiss (CT 133-35).

On April 4, 1967, counsel for plaintiffs filed a document entitled: "Amended Complaint for Money Damages, Declaratory and Injunctive Relief; Request for Temporary Restraining Order." (CT 140-49). This amended pleading named as defendants, in addition to those previously

named, Thomas C. Lynch, Attorney General of California, Doris H. Maier, "Deputy [sic] Attorney General," Fred Dickson, Chairman of the California Adult Authority, A. L. Oliver, then Warden of the California State Prison at Folsom, one Leona Ragle "mail handler" (a federal employee whom counsel for appellees do not represent and who has apparently never been served with process in this matter), A. George Oakley, "Prison Official," and eighty Does (CT 140). The amended complaint alleged that defendants had engaged in a conspiracy to deprive prisoners of due process and equal protection of the laws (CT 141-42). The specific acts complained of were:

1. Alleged attempts to prohibit or severely limit prisoner access to law books and legal opinions, attempts which had been carried out by the adoption of certain regulations (CT 142-43). These regulations are not set forth in the amended complaint, but are apparently those referred to in the original complaint.

2. Alleged deliberate delays in the delivery of mail from prisoners to courts and attorneys, and from courts and attorneys to prisoners, and confiscation of such mail (CT 143).

3. Allegedly informing prisoners that the Adult Authority penalized prisoners for filing legal documents with courts, and actually so penalizing them (CT 143).

4. Adopting and attempting to enforce regulations forbidding inmates from rendering legal assistance to one another (CT 143-44).

5. Allegedly "punishing, under guise of punishing a violation of some other rule, inmates who prepare writs, petitions, or complaints to be submitted to the courts." (CT 144).

6. Allegedly limiting the amount of time prisoners can spend in the prison library to a number of hours insufficient for them properly to prepare legal documents (CT 144).

7. Refusing to permit prisoners to receive all of the law books which the State Law Library has, and allegedly failing to maintain sufficient copies of available law books to permit prisoners to use them whenever they wish (CT 144).

8. Allegedly refusing to mail communications that prisoners have sought to mail to the Federal Bureau of Investigation and unspecified federal officials (CT 144-45).

The complaint demanded a jury trial on contested issues of fact, and the convening of a three-judge District Court "to hear and determine, on the basis of facts found by the jury, plaintiffs' demand for preliminary and permanent injunction." It also demanded that defendants be

be enjoined from enforcing the changes in prison regulations adopted by the Director of Corrections, in Department of Corrections Transmittal Letter 26/66, dated September 19, 1966, or any other regulations which would limit the access of prisoners to any legal materials, unless such regulations are enforced for purposes which do not include the prevention of prisoner acquisition of legal knowledge and expertise for use in attacking convictions and sentences in the courts, or for purposes which do not include the prohibition or discouragement of prisoners in rendering legal assistance to one another (CT 145-46). It was further demanded that defendants be enjoined from acting toward petitioners in any way which is designed to discourage them from filing legal documents in the courts, or from complaining to federal authorities concerning alleged violations of federal laws (CT 146).

The complaint closed with a demand for money damages in the modest sum of $390,000.00 (CT 146).

On April 14, 1967, appellees filed a memorandum in opposition to the motion for convening of a three-judge District Court (CT 151-53), and on May 17, 1967, filed a motion to strike prayer for damages, to dismiss, and for summary judgment (CT 174-326). On June 12, 1967, the latter motion came on for hearing before the Honorable Albert C. Wollenberg, who announced his ruling denying the

motion for convening of a three-judge District Court. The written order appears at CT 368. Counsel for appellants, announced his intention to appeal and it was stipulated that appellees' motions could go off calendar pending the instant appeal. On June 22, 1967, Judge Wollenberg granted leave to appeal in forma pauperis (CT 905). On July 6, 1967, Judge Wollenberg signed an amended order denying appellants' motion for the convening of a three-judge District Court (CT 911). This order is set forth at AOB 3 and need not be quoted here. Notice of appeal was filed July 12, 1967 (CT 906).

APPELLANTS' CONTENTIONS

I. The sole issue on appeal is whether the District Court correctly denied appellants' motion to convene a three-judge District Court on the ground that no substantial constitutional question is presented by the complaint.

II. The District Court erred in finding no substantial federal question.

SUMMARY OF APPELLEES' ARGUMENT

I. The issue on appeal is whether the District Court properly denied appellants' motion; the Court's reasons are immaterial.

II. Appellants' complaint below did not seek an injunction against the enforcement of a state statute or

order of a state administrative board or commission within the language of 28 U.S.C. § 2281.

III. The gist of appellants' complaint is an attack on a pattern or practice rather than a statute or regulation, and a three-judge District Court is therefore inappropriate.

IV. The District Court correctly held that the complaint raised no substantial constitutional question requiring adjudication by a three-judge tribunal.

ARGUMENT

I

THE ISSUE ON APPEAL IS WHETHER THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION; THE COURT'S REASONS ARE IMMATERIAL

We cannot concur in appellants' statement that the sole issue on this appeal is whether the amended complaint below raises one or more substantial constitutional questions. The District Court denied the motion to convene a three-judge court and gave no reasons for its action. Subsequently, the Court signed an order presented by appellants' counsel which stated that there was a controlling question of law involved as to which there is a substantial ground for difference of an opinion, and an immediate appeal from the order of denial might materially advance the ultimate termination of the litigation (CT 911). That question was whether appellants'

claims for injunctive relief raised one or more substantial questions of constitutional law under the standards established in California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) and Ex parte Poresky, 290 U.S. 30 (1933). However, since the order appealed from was an interlocutory order, and not a determination on the merits, appellants were not out of court and the order of denial was not appealable as of right. Only by issuing such an amended order, pursuant to 28 U.S.C. § 1292(4)(b), could the District Court confer jurisdiction on this Court, in its discretion, to hear the instant appeal. Therefore, we do not consider the District Court's certification the equivalent of a full statement giving all of its reasons for the order of denial.

At all events, the reasons of the District Court are immaterial. This appeal is from an order denying a motion to convene a three-judge District Court, and the sole issue is whether the order was correct. The requirement of a three-judge court is jurisdictional. Riss & Co. v. Hoch, 99 F.2d 553 (10th Cir. 1938). If the case is one requiring a three-judge court, any action of a single judge will be nullified by a reviewing court, and vice versa. Covington v. Montgomery County School Bd., 139 F. Supp. 161 (M.D.N.C. 1956). Therefore, it is vital to the parties to have an authoritative determination of the question of

what is the proper tribunal. The instant litigation was commenced almost a year ago, and the preliminary issue of the proper tribunal has not yet been decided.* We submit that it would be tragic for this Court to decide the instant appeal without deciding definitively the issue of whether the action below is one required to be heard by a panel of three judges under 28 U.S.C. § 2281. Therefore, though we believe the Court below was quite correct in holding that no substantial constitutional questions were raised by the amended complaint, we submit that this Court should consider other arguments relevant to the question of the propriety of a three-judge tribunal.

II

APPELLANTS' COMPLAINT BELOW DID NOT SEEK AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE STATUTE OR ORDER OF A STATE ADMINISTRATIVE BOARD OR COMMISSION WITHIN THE LANGUAGE OF 28 U.S.C. § 2281

Title 28, section 2281 of the United States Code provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining

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* "The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated." Swift & Co. v. Wickham, 382 U.S. 111, 124 (1965).

> the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added.)

The amended complaint clearly does not seek an injunction against the enforcement of any statute of the State of California. Alghough, as pointed out infra, the complaint is unclear as to precisely what it seeks to enjoin, we can only assume that an injunction is sought against the enforcement of certain prison regulations. Appellants' failure to plead that the regulations in question were orders "made by an administrative board or commission" renders the complaint insufficient as a basis for convening a three-judge court. Moreover, it is clear that the prison regulations were not made by an administrative board or commission. They were made by one man, the Director of Corrections of the State of California. This is evidenced by our second motion to dismiss below, which includes, appended to Exhibit B, the rules apparently

in question, together with a transmittal letter signed by Mr. Walter Dunbar, then Director of Corrections* (CT 221-26), and by the fact that the Director of Corrections is vested with the sole power to make prison rules and regulations, which he may change at his pleasure. See Cal. Pen. Code § 5058.

The Director of Corrections is obviously not "an administrative board or commission" within the language of 28 U.S.C. § 2281. Both "board" and "commission" are defined in Webster's New International Dictionary, (2d ed. 1938) in terms of a group or number of individuals. On the few occasions in which the courts have had occasion to define either of these words, they have always recognized that they contemplate a group of two or more persons. See City of Louisville Municipal Housing Comm'n v. Public Housing Administration, 261 S.W.2d 286, 288 (Ky. 1953); Board of Health of New Jersey v. Inhabitants of Town of Phillipsburg, 85 N.J. Eq. 161, 96 Atl. 62 (Ct. Err. & App. 1915); Wilson v. Bleloch, 125 App. Div. 191, 109 N.Y. Supp. 340, 343 (1908) (dissenting opinion); Riddle v. Fairforest Finishing Co., 198 S.C. 419, 18 S.E.2d 341 343 (1942).

In Standard Sec. Serv. Corp. v. King, 161 Tex.

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* The present Director of Corrections is R. K. Procunier.

448, 341 S.W.2d 423 (1960), the court dealt with a state statute similar to 28 U.S.C. § 2281 in that it allowed a direct appeal to the state supreme court from any order of any trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of any state statute or the validity of any administrative order "issued by any State Board or Commission under any statute of this State." In dismissing an appeal from an order denying an injunction against an order of the State Securities Commissioner, the court held that the Commissioner was not a "State Board or Commission" within the meaning of the statute. "A single administrative or executive officer does not constitute a 'State Board or Commission,' either in a legal sense . . . [citing cases] or in common understanding." 341 S.W.2d at 426.

While the distinction between the Director of Corrections and an "administrative board or commission" may seem somewhat technical, we have no hesitation in presenting it. Because the three-judge procedure dislocates the administration of district and circuit courts and places burdensome demands upon the appellate docket of the Supreme Court, 28 U.S.C. § 2281 is to be read "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

Phillips v. United States, 312 U.S. 246, 251 (1941).

The closeness of the distinction between an individual administrator and an administrative body or tribunal can be illustrated by Sweeney v. State Bd. of Public Assistance, 36 F. Supp. 171, 172, aff'd, 119 F.2d 1023 (3rd Cir.), cert. denied, 314 U.S. 611 (1941), which held that a three-judge court need not be convened to hear a constitutional challenge to the validity of a departmental regulation.

Moreover, our distinction is not so technical as it might at first blush appear. The purpose of 28 U.S.C. § 2281 is to provide "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." Ibid. (Emphasis added.) It would seem that the "administrative board or commission" contemplated by the statute would consist of more than one person, thus preventing precipitate action by a single individual, and its members would have some tenure, with a corresponding measure of independence of the appointing authority. Such a body would be a proper one to make a state's "legislative policy." By contrast, the acts of a single state officer, such as the Director of Corrections, who serves at the pleasure of the Governor, Cal. Pen. Code § 5051, are of necessity purely executive functions performed by the Governor's delegate. And it is

settled that an action to enjoin the acts and orders of a state governor is not one to be heard by a three-judge court. Phillips v. United States, supra.

The distinction between orders of the Director of Corrections and those of an "administrative board or commission" also serves to distinguish the instant case from Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), wherein this Court stated that an action seeking to enjoin, on the ground of unconstitutionality, the enforcement of prison regulations might have to be heard by a three-judge court but for the fact that the regulations in question were not of state-wide application. The rules there under consideration had been prescribed by the warden but approved, as they had to be, by the Oregon State Board of Control. Id. at 635 n.5. Thus, the "administrative board or commission" requirement was met.

It is therefore submitted that appellants' amended complaint does not seek an injunction against the enforcement of any state statute or order of an administrative board or commission, and consequently does not meet the requirements of 28 U.S.C. § 2281 for the convening of a three-judge District Court.

III

THE GIST OF APPELLANTS' COMPLAINT IS AN ATTACK ON A PATTERN OR PRACTICE RATHER THAN A STATUTE OR REGULATION, AND A THREE-JUDGE DISTRICT COURT IS THEREFORE INAPPROPRIATE

Although the amended complaint below seeks an injunction against the enforcement of certain regulations of the Director of Corrections, such an injunction is only a small portion of the relief sought. Plaintiffs below alleged and sought relief against a supposed conspiracy to deny them access to the courts. The alleged actions taken pursuant to the "conspiracy" are set out supra, and involve far more than the mere adoption of regulations governing prisoner use of law books and legal assistance by one prisoner to another. It thus appears that the amended complaint below is primarily attacking a "pattern or practice," rather than a prison regulation. Furthermore, it is far from clear that the amended complaint alleges that the prison regulations in question are invalid per se; rather, the contention seems to be that they are invalid in the light of the alleged "conspiracy." Such an attack has been held to be one for a single judge, rather than a three-judge District Court. See Clark v. Thompson, 204 F. Supp. 30 (S.D. Miss. 1962).

In this connection, it may be noted that appellants' claims seem to be primarily of a factual,

rather than a legal nature. As such, their resolution by a three-judge court would be inappropriate. Bartlett & Co., Grain v. State Corp. Comm'n, 223 F. Supp. 975 (D. Kan. 1963). The amended complaint makes numerous factual allegations, and the only one in effect admitted by appellees is the adoption of the regulations under attack. Appellees' motion to dismiss and for summary judgment makes clear that issues of fact would be joined as to other allegations, were it to be held that they stated a cause of action. See CT 174-203. The amended complaint demands a jury trial on contested issues of fact, and requests that a three-judge court be convened to determine the injunction application on the basis of facts found by the jury (CT 145)--surely a novel procedure in litigation before a three-judge District Court.

Moreover, it would appear that even the determination of the validity of the challenged regulations of the Director of Corrections is primarily a factual determination. Appellants assert as their sole constitutional claim that the regulations deny them reasonable access to the courts. The court below observed at oral argument that whether appellants are actually being denied access to the courts is essentially a question of fact. As pointed out by amicus, Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir. 1961) stated: "Whether or not in a

particular case the access afforded is reasonable depends upon all of the surrounding circumstances."

The foregoing observation by this Court is particularly applicable here. It is our position, set out at greater length infra, that the regulation of law book use by prisoners can never interfere with reasonable access of prisoners to the courts. But if the contrary be assumed, arguendo, it is still obvious that the regulations here under attack could not, standing alone, be held unconstitutional. The regulations set forth an exclusive list of law books for prison libraries and prohibit prisoners from possessing personally-owned law books (CT 222). But they also state that state law library privileges for prisoners will be continued (CT 224). Thus, even if it were held that some law books must be made available to prisoners, the validity of the challenged regulations would hinge on the actual availability of state law library books--a purely factual matter. Also indicative of the primarily factual nature of the issues raised by the amended complaint below is the prayer for damages (CT 146), which, absent mutual waiver, could be awarded only by a jury.

We recognize that the mere fact that issues which do not require a three-judge court are joined with issues which do not deprive a three-judge court of

jurisdiction. See Hatfield v. Bailleaux, 290 F.2d 632, 634 n.2 (9th Cir. 1961). But we suggest that the three-judge procedure should be utilized only where pure questions of law are involved. It would be contrary to congressional intent to require three judges, including a circuit judge, to spend weeks in a courtroom hearing testimony in an effort to unravel complex factual issues. And we fail to see how a jury could, as a practical matter, make the complex findings of fact which, in the instant litigation, would frame issues of law in a manner clear enough to enable three judges properly to resolve them. Where, as here, mixed questions of fact and law are present, and questions of fact predominate, it would seem that a single judge is best suited to resolve them. A three-judge court, resembling as it does an appellate tribunal more than a trial court, is ill-suited to resolving the issues of the instant litigation, and its unnecessary use of two busy judges would severely dislocate the administration of this Court and the District Court.

Because appellants' complaint below attacks a pattern or practice rather than a statute or regulation and raises primarily factual questions, we respectfully submit that a three-judge District Court is neither necessary nor proper in the instant litigation.

IV

THE DISTRICT COURT CORRECTLY HELD THAT THE COMPLAINT RAISED NO SUBSTANTIAL CONSTITUTIONAL QUESTION REQUIRING ADJUDICATION BY A THREE-JUDGE TRIBUNAL

Appellants agree that a three-judge court is not required where no substantial constitutional question is raised by the pleadings, Swift & Co. v. Wickham, 382 U.S. 113, 115 (1965), but contend that the constitutional questions purportedly raised by their amended complaint are substantial. We disagree.

Appellants seek to rely on the tests for substantiality established by California Water Service Co. v. City of Redding, 304 U.S. 232 (1938) and Ex parte Poresky, 290 U.S. 30 (1933). In the latter case, it was stated that "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject . . . ." Id. at 32. It is our position that any constitutional issue raised by the amended complaint relating to the regulations sought to be enjoined is obviously without merit. Furthermore, they are foreclosed by previous decisions; though these may not be decisions of the United States Supreme Court, it is our position that the doctrine that only decisions of that Court can so foreclose an

issue as to render it insubstantial has been so attenuated as to lose all viability.

There is authority to the effect that a constitutional issue may, for purposes of determining the necessity of convening a three-judge court, be rendered insubstantial by decisions other than those of the Supreme Court. In Voege v. American Sumatra Tobacco Corp., 192 F. Supp. 689 (D. Del. 1961), the court held certain questions insubstantial on the authority of state-court cases, even though noting that they had never been passed on by the Supreme Court.

Further, it is clear that the doctrine of Supreme Court foreclosure of constitutional issues has been honored more in the breach than the observance. Several cases have held constitutional questions insubstantial without citing Supreme Court decisions. See Swift & Co. v. Wickham, 382 U.S. 111, 114-15 (1965) (no analysis, reasoning, or citation of any authority) Benoit v. Gardner, 351 F.2d 846 (1st Cir. 1965) (citing Supreme Court cases for some points but not for others); Smith v. California, 336 F.2d 530 (9th Cir. 1964); Powell v. Workmen's Compensation Bd. of New York, 327 F.2d 131 (2d Cir. 1964).

And if questions can be rendered insubstantial by decisions of courts other than the Supreme Court, then

the questions here are certainly insubstantial. The amended complaint below attacks as unconstitutional only those regulations which limit the titles and numbers of law books available in prison libraries, prevent inmates from possessing personally-owned law books, and forbid inmates to prepare legal documents for one another. A decision of this Court, Hatfield v. Bailleaux, 239 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 362 (1961), has decided the constitutionality of similar rules in a manner directly contrary to appellants' position. That case clearly holds that state authorities have no constitutional duty to provide law books for prisoners, permit them to possess any law books, or permit them to engage in the unauthorized practice of law by preparing legal documents for other prisoners. Subsequent federal decisions are in accord with Hatfield. E.g., Lee v. Tahash, 362 F.2d 970, 943-74 (8th Cir. 1965); Roberts v. Pepersack, 256 F. Supp. 415, 433-34 (D. Md. 1966); United States v. Pennsylvania, 247 F. Supp. 4, 13 (E.D. Pa. 1965); Austin v. Harris, 226 F. Supp. 304, 307 (W.D. Mo. 1964). So are California cases. In re Allison, 66 A.C. 276, 425 P.2d 193, 57 Cal.Rptr. 593 (1967); In re Schoengarth, 66 A.C. 288, 425 P.2d 200, 57 Cal.Rptr. 600 (1967).

Amicus has made a feeble attempt to cite contrary authority in an attempt to show that the question is still open. Brief of Amicus Curiae, p. 7. But this authority does not aid appellants. In United States ex rel. Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa. 1963), it was held that under the circumstances of the particular case, the petitioner had a right to be allowed to purchase a copy of the state rules of procedure. That case was expressly limited to its facts in United States v. Pennsylvania, supra, at 13 n.18. It is the only authority we have found to the effect that a prisoner can ever be held to have a constitutional right to any law book. But it is interesting to note that the regulations here under attack provide for thirteen named law books to be stocked in every California prison library, and these books include state and federal court rules. In Mayberry, supra, the prison provided no law books at all.

Amicus also cites Gaito v. Prasse, 312 F.2d 169 (3rd Cir. 1963) and Barone v. Warden, Manhattan House of Detention for Men, 209 F. Supp. 309 (S.D.N.Y. 1962), both of which turned upon the doctrine of exhaustion of remedies and neither of which intimated that the claims of denial of law books stated any ground for relief. Finally, amicus refers the Court to Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966). This case has become a favorite

of prisoners since publication of the opinion of the District Court. It correctly holds that prisoners have no right to law books, but comes to the unsound conclusion that they do have a right to assist one another in the preparation of federal habeas corpus petitions. This was the only decision which had even intimated the existence of such a right. Fortunately, it has been reversed by the Court of Appeals for the Sixth Circuit, and an unseemly blemish on the law thus removed. Since the reversing opinion has not yet been published in the reports, we are printing a copy in the appendix to this brief. The opinion of the Court of Appeals, we think, underscores the fact that the matter is no longer "open to discussion." See Brief of Amicus Curiae, p. 7.

We suggest also that the refusal of the Supreme Court ever to hear a case presenting issues of the sort raised herein speaks quite as loudly as any formal decision of that Court, and lends weight to the proposition that these questions are not substantial.

If decisions of courts other than the Supreme Court are not held sufficient to "foreclose" the issue of substantiality, they certainly set up a legal framework within which to determine whether appellants' claims are "obviously without merit." We submit that the obvious lack of merit in appellants' attacks on the prison

regulations in question follows from the principle set forth in Hatfield v. Bailleaux, supra. This principle is simply that a prisoner seeking to file in federal court a petition for habeas corpus or a complaint under the Civil Rights Act need do no more than make factual allegations. Legal arguments are no proper part of such a petition or complaint, and in fact detract from its effectiveness. Access to law books is therefore wholly unnecessary to the preparation of such a petition or complaint. Any legal knowledge necessary for the preparation of a habeas corpus petition is supplied by the forms appended to our motion to dismiss below (Exhibits C, D, and E, appearing at CT 232-249). And any contention that illiterate inmates are denied access to the courts unless other inmates are allowed to prepare petitions for them is met in light of the prison regulations under attack, which permit prison personnel to prepare petitions for inmates physically unable to do so.

In an attempt to show that their contentions are not "obviously without merit," appellants refer to the words of Judge Sweigert who, in his order of January 10, 1967, appointed counsel because the actions theretofore filed by prisoners in propria persona "raise important questions . . . ." (CT 69). This is far from

an adjudication that the contentions were substantial enough to require a three-judge court, and there is no indication that it was intended to be. But if appellants wish to regard this order as authority, we will accept it as authority for our own position. Where a complaint has been filed which can properly be heard only by a three-judge court, the single judge to whom it is presented has the duty of convening a three-judge court sua sponte. Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962), cert. denied, 372 U.S. 953 (1963). Therefore, since Judge Sweigert failed to convene such a court, his order must be authority for the proposition that it was not necessary to do so. Moreover, if appellants wish to indulge in a battle of District Court minute orders, we direct their attention to the order of the Honorable Robert F. Peckham in Beattie v. Nelson, Misc. No. 1943 (N.D. Cal. October 2, 1967). The order recites that the plaintiff (incidentally, one of the named plaintiffs below) sought permission to file in forma pauperis a civil rights complaint contending that the warden of the California State Prison at San Quentin had prohibited him from purchasing legal materials. Judge Peckham ruled that the complaint failed to state a federal question and denied permission to file it in forma pauperis. The order is printed in the appendix to this brief.

In sum, we submit that the Court below was clearly correct in concluding that appellants' attack on the challenged prison regulations failed to present a substantial federal question. And we must note our disagreement with the suggestion of amicus (Brief of Amicus Curiae, p. 2) that the Court's order amounted to a dismissal on the merits. At the request of counsel for appellants, Judge Wollenberg expressly withheld any ruling on the merits of the complaint. His ruling denying a motion to convene a three-judge court left open the possibility that the complaint in toto, including an attack on the challenged regulations in the light of the other contentions put forward, could present a substantial federal question for a decision by a single judge.

CONCLUSION

We have shown that plaintiffs' complaint failed to challenge the constitutionality of a state statute or order of an administrative board or commission, within the language of 28 U.S.C. § 2281, constituted an attack upon a pattern or practice, which attack presented largely factual issues, and failed to raise a substantial federal question concerning the constitutionality of the challenged prison regulations. We submit that any or all of these points constitute a sufficient basis for upholding the

ruling of the Court below, and therefore respectfully request that the judgment of the District Court be affirmed.

Dated: October 11, 1967.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: October 11, 1967.

George R. Nock

GEORGE R. NOCK
Deputy Attorney General
of the State of California

A P P E N D I X

No. 17292

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM JOE JOHNSON,
Petitioner-Appellee,
v.
HARRY S. AVERY, Commissioner of Correction, and
C. MURRAY HENDERSON, Warden, Tennessee State Penitentiary,
Respondents-Appellants.

APPEAL from United States District Court, Middle District of Tennessee, Nashville Division.

Decided August 31, 1967.

Before WEICK, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. The crux of this case is the question of validity of a regulation of the Tennessee State Penitentiary at Nashville, which prohibits any inmate from advising or assisting other prisoners in the preparation or filing of writs of habeas corpus or other legal papers.[1] The regulation was promulgated and enforced by the defendants-appellants in

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[1] Guidance Manual for Prisoners, Sec. VI, page 7:

"No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

their official capacities as Commissioner of Correction of the State of Tennessee and Warden of the State Penitentiary, respectively.

After being subjected to punishment for repeated violations of the rule, usually by confinement in the "maximum security building" of the prison, petitioner filed a "motion for law books and a typewriter", which the District Court treated as an application for a writ of habeas corpus, and granted. The prison authorities appealed.

The District Court reasoned that because the words of the habeas corpus statute, 28 U.S.C. § 2242, authorized the filing of an application for a writ of habeas corpus "signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*" (emphasis added), the prison regulation conflicted with the Federal law. The District Court further held that unless petitioner could continue to serve as a "writ writer" or "jailhouse lawyer" for his fellow inmates, their constitutional rights to the effective aid of habeas corpus would be endangered since "without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter, or request." We must disagree with both of these conclusions.

At the outset, we agree with the holding of the District Court that petitioner has standing to question the validity of the regulation. While defendants urge that petitioner himself has never been denied the right to file petitions on his own behalf in Federal or state courts, it seems clear that he has been subjected to a restraint upon his liberties unauthorized by the life sentence he is serving. In such a case, habeas corpus will lie to inquire into the lawfulness of this added punishment, even though it will not result in his unconditional release from prison. *Martin v. Commonwealth of Virginia*, 349 F.2d 781 (4th Cir. 1965); *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944) *cert. denied* 325 U.S. 887 (1945).

The perspective through which we view this question, even though it seems one of first impression, must be framed by the well-established reluctance of the Federal Courts to intervene in internal affairs of state or Federal penal institutions. Regulations for the administration and discipline of prisons, promulgated and enforced by duly authorized officials, are not subject to review by the courts unless it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the Constitution. *United States* v. *Marchese*, 341 F.2d 782 (9th Cir. 1965) *cert. denied* 382 U.S. 817 (1965); *McCloskey* v. *Maryland*, 337 F.2d 72 (4th Cir. 1964); *Kirby* v. *Thomas*, 336 F.2d 462 (6th Cir. 1964); *Sostre* v. *McGinnis*, 334 F.2d 906 (2nd Cir. 1964) *cert. denied* 379 U.S. 892 (1964); *Childs* v. *Pegelow*, 321 F.2d 487 (4th Cir. 1963) *cert. denied* 376 U.S. 932 (1964); *Hatfield* v. *Bailleaux*, 290 F.2d 632 (9th Cir. 1961) *cert. denied* 368 U.S. 862 (1961); *Siegel* v. *Ragen*, 180 F.2d 785 (7th Cir. 1950) *cert. denied* 339 U.S. 990 (1950).

This proposition is soundly based on the fact that prison administration is a function of the executive branch of the Government and one for which the courts, with their limited experience and facilities, are ill-suited to undertake. Further, in this case the imperatives of our Federal system require special concern for the boundaries of state and Federal governmental competence as allocated by our basic charter.

An important additional consideration here is the undisputed right of individual states to specify the qualifications for entrance to their respective bars and to regulate the practice of law within their borders. *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Emmons* v. *Smith*, 149 F.2d 869 (6th Cir. 1945) *cert. denied* 326 U.S. 746 (1945); *Niklaus* v. *Simmons*, 196 F. Supp. 691 (D. Neb. 1961). See also *Theard* v. *United States*, 354 U.S. 278 (1957); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

While the interests of the states are sometimes deemed less

significant than those provisions of the Constitution upon which they may impinge, see *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964), *NAACP* v. *Button*, 371 U.S. 415 (1963), *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), it is interesting to note that in all cases where the state's regulatory power was limited in deference to Constitutional standards, the practitioners involved were all concededly qualified to practice law by previous academic training. In no case has the Constitution been read to grant an untrained and unlicensed person the right to practice law.

The State of Tennessee has enacted a series of statutes governing qualification and admission to the practice of law, T.C.A. §§ 29-101 - 110; the rights and duties of attorneys, T. C.A. §§ 29-201 - 204; and unauthorized practice and improper conduct, T.C.A. §§ 29-301 - 312. These sections include provisions for court assignment of counsel for paupers, permission for any party to conduct his own case, prohibitions upon the unlawful practice of law, and penalties for falsely representing oneself as an attorney. Petitioner does not allege that he has complied with any of these laws, despite the fact that his activities clearly constitute unlawful practice in Tennessee[2].

In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary. (There seems to be little question that petitioner, a convicted felon, could ever obtain a license to practice in state or Federal Courts even if he had the required legal education, which he does not have.)

The main thrust of the District Court's opinion on this issue

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[2] T.C.A. § 29-302 defines the practice of law in Tennessee as follows:

"The 'practice of law' is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents, or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies."

was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders.

While we agree that representation by counsel may be a significant part of the post-conviction remedy, it is important to recognize that the Supreme Court has not yet held that it is an indispensable element of due process under the Constitution. Several circuits have stated the advisability of appointing counsel. *Taylor* v. *Pegelow*, 335 F.2d 147 (4th Cir. 1964); *Dillon* v. *United States*, 307 F.2d 445 (9th Cir. 1962); *United States* v. *Wilkins*, 281 F.2d 707 (2d Cir. 1960). However, it is not required in every such case, *Barker* v. *Ohio*, 330 F.2d 594 (6th Cir. 1964). In any event, the Federal Courts have power to appoint counsel for indigents in proceedings before them to assure the protection of the indigents' rights. 28 U.S.C. § 1915(d).

The same concern for effectuating basic Constitutional rights through representation by counsel, which motivated the District Court in this case, is evidenced in recent cases in which the Supreme Court has defined the need for counsel in "critical" pre-trial stages, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Wade*, — U.S. — (1967), as well as at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Yet in none of these cases did the Court indicate that these rights could be protected through representation by a layman. To the contrary, the Court has consistently emphasized that it is representation *by trained counsel* which is necessary to take advantage of the full scope of an accused's rights and shield him from unfair tactics or his own ignorance.

We agree with this approach to the problem of effectuating Constitutional rights both as to pre-trial events and post-con-

viction proceedings. Indeed, we believe that no favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims.

We do not agree with the District Court that "[b]y preparing petitions for other prisoners, the petitioner is certainly acting in their behalf." Neither the language nor the policy of 28 U.S.C. § 2242 justifies such a conclusion.

The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers. See *United States* v. *Houston*, 273 Fed. 915 (2d Cir. 1921).

The problem of providing effective access to legal assistance at all stages of criminal justice, from pre-trial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court.

Reversed.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBERT G. BEATTIE,

Petitioner,

vs.

L. S. NELSON, Warden, San Quentin Prison, Mr. James W.L. Park, Administrator, San Quentin Prison, et al.,

Respondents.

No. 1943

ORDER

Plaintiff, an inmate at San Quentin State Prison, requests permission to file in forma pauperis a civil rights complaint against Warden Nelson wherein he contends that the named respondent has prohibited plaintiff from purchasing legal materials with his own funds, said legal materials being necessary for the proper research and presentation of his pending legal actions.

Except under extraordinary circumstances, the federal courts will not inquire into the internal matters of a state penetitentiary. See U.S. ex rel Lee V. Illinois, 343 F.2d 120 (7th Cir. 1965); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965). The instant case does not present a factual situation of an extraordinary nature. Prison inmates have no constitutional right to accumulate their own personal law library. See Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

This is not a case, as in DeWitt v. Pail, 366 F.2d 552 (9th Cir. 1966), where the action of the respondent has interfered with an inmate's access to the courts. Here there is no allegation of a deprivation of a right, privilege, or immunity secured by the Constitution which is necessary to bring the

complaint within the framework of the Civil Rights Act, Title 42 U.S.C.A. § 1983.

In Shobe v. State of California, 362 F.2d 545 (9th Cir. 1966), it was held that the privilege of filing and prosecuting a civil action under the provisions of 28 U.S.C. § 1915 is a matter within the discretion of this Court. Pursuant to that discretion, leave to file this complaint in forma pauperis is hereby DENIED.

DATED: September 29,1967.

S/Robert F. Peckham
United States District Judge